

BEFORE THE COMMISSION ON COMMON OWNERSHIP COMMUNITIES

IN THE MATTER OF:

GEORGE L. MARTHINUSS, JR.
17957 Dumfries Circle
Olney, Maryland 20832

Complainant

v.

Case No. 364-O

**LAKE HALLOWELL HOMEOWNERS
ASSOCIATION, INC.**
2103 Rose Theater Circle
Olney, Maryland 20832

Respondent

DECISION AND ORDER

The above case having come before the Commission on common ownership communities for Montgomery County, Maryland pursuant to §10B-5(i), 10B-9(a), 10B-11(f), 10B-12, and 10B-13 of the Montgomery County Code 1994 as amended, and the Commission having considered the record, it is therefore this 8th day of January, 1998 found, determined and ordered as follows:

BACKGROUND

On May 7, 1997, the Complainant, George L. Marthinuss, Jr. filed a formal complaint with the Office of Common Ownership Communities, alleging that the Board improperly allowed an exception for his neighbor to have a deck lattice (privacy fence) height that exceeded community's Architectural Control Guidelines.

On Wednesday, July 2, 1997, the Commission on Common Ownership Communities accepted jurisdiction of the dispute and appointed a hearing panel.

On October 15, 1997, a hearing was conducted wherein both the Plaintiff and Respondent appeared without counsel.

At the Hearing, the Complainant produced evidence that at least by November 19, 1996 the Association had acknowledged that the Association's Architectural Committee had in fact erred in approving the neighbor's application for the construction of the privacy fence.

The Complainant produced evidence that the Association regularly enforced its Architectural Control Guidelines with respect to him and other homeowners.

FINDINGS OF FACT:

Based upon the record, the Commission makes the following findings of fact:

1. The Complainant, George L. Marthinuss, Jr., at all pertinent times herein was the owner of a townhouse at 17957 Dumfries Circle, Olney, Maryland.
2. Lake Hallowell Homeowner's Association Architectural Control Guidelines provide that written approval must be obtained from it before construction of any fence and in pertinent part provide specifically the following:

Decks, porches and patios - all structures must be within County and State Building Codes. Material is limited to pressure treated lumber or cedar. Rail, posts and pickets may be painted to match the trim or maybe painted white. Ground level decks require lattice or shrubbery screen.

(a) Townhouses - Decks cannot extend beyond twelve feet in the rear of the townhome. The furthest point is the part of the house which protrudes furthest towards the back of the property line.

(b) Lattice - can only be added to one side of the decks or patios. The height of the lattice is not to exceed six feet above deck level, must be natural wood and painted or stained. Materials must be pressure treated wood.

3. Some time in June 1996 owners of the adjacent property to the Complainant, residents of 17959 Dumfries Circle, erected a lattice privacy fence on their deck on the side abutting the property of the Complainant that measured in excess of eight feet in height and twelve feet in length.

4. At the hearing, the Complainant produced evidence of the affidavit of Edward D. Thomas, Community Manager, (ex. #145 - 146) that at least by November 19, 1996 the Association had acknowledged that the Association's Architectural Committee had in fact erred in approving the neighbor's application for the construction of the fence.

5. The Complainant requested that the Board require the occupants of 17959 to remove or alter the section of lattice in question. That following March, the Board of Directors at the meeting of the Board, voted to require the occupants of 17959 Dumfries Circle to lower their "privacy" (lattice) screen from eight feet to seven feet in height above the deck and to allow the length of the fence to remain at twelve feet. The Complainant was notified on March 27, 1997 that, after careful consideration, the Board of Directors agreed to permit the owners of 17959 Dumfries Circle to lower the height of the lattice from eight feet

to seven feet. The Board of Directors notified the Complainant that it denied his request to require the adjacent neighbors section of lattice to be removed or altered any further.

6. The Complainant produced evidence that the Association regularly enforced its Architectural Control Guidelines with respect to him and other homeowners.

7. The Respondent produced evidence through Mr. Jim Folk which showed that the height of the privacy fence of the residence of 17959 Dumfries Circle after the modification was truly seven feet (but by his estimation, only six feet above the deck level of Respondent's deck).

CONCLUSIONS OF LAW

8. The Panel finds that the governing documents of the Association were properly adopted and are enforceable. These include the By-laws of Lake Hallowell Homeowners Association, Inc., the Declaration of Covenants, Conditions and Restrictions, Articles of Incorporation of Lake Hallowell Homeowners Association, Inc., and the Architectural Guidelines which were adopted pursuant to Article V of the Declaration of Covenants, Conditions and Restrictions.

9. The Panel finds that the Association is governed through its Board of Directors and relied upon and enforced the Architectural Control Guidelines.

10. The Panel finds that the height of the privacy fence constructed on the rear patio of the Homeowners Property located at 17959 Dumfries Circle was erroneously approved in violation of the ACC guideline on May 14, 1996 (ex.# 148)

11. The Panel further finds that the Board of Directors failed to adequately and properly correct the erroneous approval when this fact was timely and properly brought to its attention by the Complainant.

12. The Panel specifically finds that the lattice fence exceeds the ACC Guidelines in its present condition, and that to date no appropriate remedy has been initiated to bring it into conformity.

13. The Panel further finds that the Complainant has established the requisite burden to prove that the privacy fence constructed on the patio deck of 17959 Dumfries Circle exceeds the height requirement as set forth in the Association's governing documents.

ORDER:

In view of the foregoing, and based upon the record in this case, the testimony provided by the Complainant and Respondent and their witnesses as well as any exhibits accepted in evidence during the hearing, the Commission Orders that:

1. The Respondent, within a reasonable time as herein specified in this Order, must take steps to bring and cause the "privacy fence" constructed on the rear patio of the property located at 17959 Dumfries Circle, to have a maximum height measured from the floor of its deck not to exceed six feet.

2. That the Respondent shall have sixty days in which to accomplish this modification.

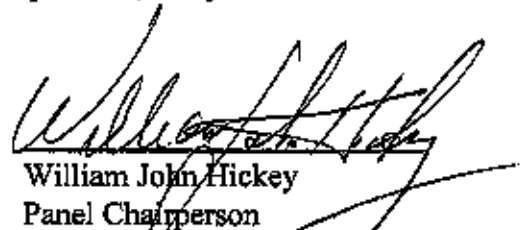
3. That all costs associated therewith be borne by the Respondent and not by the residents of the property at 17959 Dumfries Circle.

4. That the construction be performed within acceptable customary deck construction standards and it is further

ORDERED that the Respondent pay all costs, filing fees associated with this proceeding.

The foregoing was concurred in by panel members Hickey and Weiss with panel number Gaffigan dissenting from this Opinion.

Any party aggrieved by the action of the Commission may file an administrative appeal to the Circuit Court of Montgomery County, Maryland within thirty (30) days from the date of this Order pursuant to Title 7, Chapter 200, Maryland Rules Procedure.


William John Hickey
Panel Chairperson
Commission Ownership Communities